NO. 77-1550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

RECREATIONAL PRODUCTS MARKETING, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

REPLY MEMORANDUM FOR PETITIONER

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In reply to the Government's Memorandum in Opposition, the petitioner makes the following comments:

1. We are amazed at the Government's effort (Memo., p. 4, n. 4) to avoid the conflict in principle between the decisions below and this Court's holding in *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 574 (1931), that the tax applies to the first sale of the product. Even Judge (now Solicitor General) McCree recognized in his dissenting opinion in *Air Lift v. United States*, 418 F.2d 558, 559-560 (C.A. 6, 1969), that the holding in *Indian Motorcycle* raised the "more significant issue" for reso-

lution in this type of case. Little we could say would more dramatically evidence the need for plenary review to settle the rampant confusion which has lead to ad hoc and inconsistent results.

2. Ignoring *Indian Motorcycle*, the Government raises (Memo., pp. 3-4) a "proprietary interest" analysis in support of the decision below.[1] Under this analysis, a person having a "proprietary interest" in the product is the manufacturer even though he performs no act of manufacture. This would subject a patent holder to liability as a matter of law. This analysis was rejected by the courts in *Air Lift*. In an effort to avoid the conflict with *Air Lift*, the Government raises (Memo., pp. 4-5) an ad hoc refinement upon its "proprietary interest" analysis. The Government now urges that *Air Lift* is distinguishable and hence the decisions are not in conflict because in *Air Lift* the fabricator was free to sell the product to others for nonpatented and nontaxable uses. That is a factual distinction between the two cases; the presence of different facts, however, does not avoid the conflict, for the courts in *Air Lift* did not base their decisions on that distinction. Indeed, the district court there expressly rejected the Government's argument that the patent per se requires taxation of the patent holder rather than the fabricator. And, in affirming on the basis of the district court's opinion, the court of appeals summarily reviewed the pertinent

1. Although the Government states (Memo., p. 3) that the "proprietary interest" analysis is "*a* critical factor" (emphasis supplied) to resolution of the issue raised, this is the only factor now asserted by the Government in support of the decisions below. We assume that this is because other factors urged by the Government and apparently relied upon by the courts below—e.g., the discredited factor of petitioner's supplying tools—are demonstrably spurious. (See par. 5 *infra*.)

facts and neither mentioned nor hinted in any way that this distinction was pertinent to its affirmance.

3. The Government offers no support for its "proprietary interest" analysis or for the refinement it advances to distinguish *Air Lift*. The reason, of course, is that the Government cannot support either position, without rejecting this Court's holdings in *Indian Motorcycle* and in *F. W. Fitch Co. v. United States*, 323 U.S. 582 (1945). While, as noted, the Government made a spurious effort to distinguish *Indian Motorcycle*, the Government ignores altogether the blatant inconsistency between the decisions here and the holding in *Fitch*. (See Pet., pp. 12-13.) Congress did not intend in enacting this statute nor did this Court intend in deciding *Fitch* to permit the Government to have its cake and eat it too, by applying the tax to the first sales price without downward adjustment based on perceived equitable considerations but applying the tax to the second (and higher) sales price based on perceived equitable considerations. Such a startling interpretation of the statute deserves plenary review by this Court.

4. Further evidencing the need for review is the Government's inconsistent application of the "proprietary interest" analysis. The Government thus ignores its nonapplication to the name brand product, which confers an equal proprietary interest. (See Pet., pp. 11-12.) Certainly, there is nothing in the statute or in the apparent logic of the "proprietary interest" analysis which would justify the distinction. And, while this petitioner cannot avoid a tax simply because others similarly situated avoid the tax, the Government's apparent good faith exemption of the others suggests less certainty as to the merits of this analysis than the Memorandum in Opposition acknowledges.

5. Finally, the Government abandons (and correctly so, see Pet., pp. 13-14) its reliance upon the petitioner having supplied special tools and paid special charges. Yet, before both courts below the Government urged this as a consideration, and the district court below cited (Pet. App. 5a) this consideration as a significant aspect of the cases upon which it relied—*Charles Peckat Mfg. Co. v. Jarecki,* 196 F.2d 849 (C.A. 7, 1952), cert. denied, 344 U.S. 875 (1952), and *Polaroid Corp. v. United States,* 235 F.2d 276 (C.A. 1, 1956), cert. denied, 352 U.S. 953 (1956). The Government's abandonment of this spurious position casts doubt upon the authority of *Peckat* and *Polaroid,* and therefore casts doubt upon the merits of the decisions below. In any event, the Government's abandonment of this position after maintaining it for so many years further evidences significant confusion and the need for this Court to settle this area of taxation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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